IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CAROL B. MCCULLOUGH, ESQ.	:	**No. 98-6344 JB**
MCCULLOUGH LAW OFFICES, P.C.,	:	**ON APPEAL**
Appellants,	:	
	:	
v.	:	**Bankruptcy No. 96-16524**
	:	
GLORIA CHAMBERS,	:	
Appellee.	:	**Adversary No. 97-918**
	:	

ORDER & MEMORANDUM

ORDER

AND NOW, to wit, this 25th day of April, 2000, upon consideration of the Appeal of Carol B. McCullough and McCullough Law Offices, P.C., from the final Order of the Bankruptcy Court for the Eastern District of Pennsylvania, dated November 4, 1998, and the related submissions of the parties, **IT IS ORDERED** that the Bankruptcy Court's Order of November 4, 1998 denying Appellants any fees beyond an original retainer of $750, denying Appellants reimbursement for costs, and ordering Appellants to return to Appellee all monies held in an escrow account, is **AFFIRMED**.

MEMORANDUM

This is an appeal from a final Order by the United States Bankruptcy Court for the Eastern District of Pennsylvania entered on November 4, 1998, in proceedings removed from state court. The action was initiated by Carol B. McCulluough and her law firm, McCullough

Law Offices, P.C., and relates to legal fees allegedly owed by Gloria Chambers to McCullough for representation both prior to and during bankruptcy proceedings under Chapter 13 in 1996. After a trial, the Bankruptcy Court found in favor of Chambers, denied McCullough all compensation sought in the action beyond the amount of an original retainer paid by Chambers, denied McCullough reimbursement for costs, and ordered McCullough to release certain monies held in escrow which had been obtained by her on behalf of Chambers. For the reasons stated below, this Court affirms the Bankruptcy Court's Order of November 4, 1998.

I. BACKGROUND AND PROCEDURAL HISTORY[1]

In the spring of 1996, Gloria Chambers ("Appellee") was having legal troubles relating to her family residence. Among other things, the mortgage on her property had been foreclosed, and the holder of a sheriff's deed was seeking to evict Appellee and her family from their home. As a result, Appellee sought the advice of a lawyer. On April 12, 1996 she entered into a written retainer agreement by which she retained Carol McCullough, an attorney, and her law firm, McCullough Law Offices, P.C. ("Appellants"), to, inter alia, set aside the sheriff's sale of her home and to return the premises to her free and clear of all liens and encumbrances except for the mortgage. Appellee paid a retainer of $750 and agreed to an hourly rate of $175 for all future legal services rendered by Appellants.

The record reflects that Appellants immediately began working to save Appellant's home.

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[1]For a more complete recitation of the facts involved in this case, see In re Gloria Chambers,Bankr. No. 96-16524 SR (Chambers v. McCullough, Adv. No. 97-918) (Bankr. E.D. Pa. Nov. 4, 1998).

For example, Appellants conducted legal research, drafted letters to title companies, and negotiated with other attorneys all in an effort to have Appellee's problems favorably resolved. However, the record also reflects that most of the legal services for which Appellants seek compensation were actually provided by McCullough's father, Stuart A. Eisenberg[2], a paralegal at McCullough's law firm, without McCullough's supervision.

Soon after assuming the representation, Appellants advised Appellee to file a petition for bankruptcy pursuant to Chapter 13 of the Bankruptcy Code. Appellants suggested this tactic because it would allow Appellee to remain in her home a while longer before the impending eviction. Appellee ultimately agreed and on July 16, 1996 Appellants filed a Chapter 13 petition on Appellee's behalf. Upon filing the petition Appellants, as Appellee's counsel, were required to file a written statement disclosing all compensation paid or agreed to be paid to them by Appellee for services rendered in contemplation of or in connection with the bankruptcy case, pursuant to 11 U.S.C.A. § 329(a) (West 1993) and Fed. R. Bankr. P. 2016(b) (West Supp. 2000). In response to this required disclosure, however, Appellants failed to report to the Bankruptcy Court that Appellee had paid a $750 retainer to Appellants and that they had a fee arrangement with Appellee. To the contrary, Appellants falsely stated in their disclosure form that they had received no compensation from Appellee for legal services rendered, and that they expected to receive no legal fees from her in the future.

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[2]The record reflects that Eisenberg was an attorney prior to 1990, but in or about February of 1990 he was suspended from the practice of law by the Supreme Court of Pennsylvania. Although Eisenberg has since been reinstated as a member of the bar, see In re Eisenberg, 709 A.2d 90 (Pa. 1990), at all times relevant to the instant case he was not licensed to practice law.

Apparently dissatisfied with the services she was receiving from Appellants, Appellee decided to change legal counsel approximately seven months after first retaining Appellants. Appellee retained Doron A. Henkin, Esq. to represent her in all future matters related to this case. By letter dated November 22, 1996 Henkin informed Appellants that he had been engaged by Appellee. In that letter Henkin also requested that Appellants forward to him all files, records and funds in their possession relating to Appellee's case.

Unknown to Appellee at the time, Appellants had on deposit in an escrow account $3,684 belonging to Appellee which they had received from the Philadelphia Sheriff's Department. In response to Appellee's notification concerning the appointment of new counsel, Appellants refused to turn over any files or the monies held in escrow until Appellee paid for the services rendered by Appellants to that time. Appellants had not demanded payment from Appellee at any time before being notified that Appellee no longer wished to be represented by them.

Appellee eventually lost her home. For reasons that are not entirely clear from the record Appellee, through her new counsel, voluntarily dismissed her pending bankruptcy case on January 15, 1997.

On June 25, 1997 Appellants filed a complaint in the Court of Common Pleas of Philadelphia demanding legal fees plus costs and interest.[3] On August 13, 1997 Appellee

[3]Appellants originally sought damages totaling $25,172 for legal fees, costs and interest at the legal rate. However, Appellants subsequently reduced their demand to $16,899, thereby reflecting only those fees which they contend pertain to matters outside Appellee's bankruptcy case. This adjusted damages claim is comprised of $15,566 in pre-petition fees, $1,302 in post-petition non-bankruptcy fees, costs of $780.90, less Appellee's $750 retainer deposit.

removed the case from the Court of Common Pleas to Bankruptcy Court, pursuant to 28 U.S.C.A. § 1452(a) (West 1994) and Fed. R. of Bankr. P. 9027 (West Supp. 2000). Appellee also counterclaimed, demanding disgorgement of the monies collected by Appellants on behalf of Appellee, and relinquishment of all files. On November 3, 1997 the Bankruptcy Court reopened Appellee's bankruptcy case (without opposition by Appellants) for the limited purpose of resolving the foregoing collection dispute through an adversary proceeding. The court classified the matter as a "core proceeding" and asserted jurisdiction over the subject matter pursuant to 28 U.S.C.A. § 1334 (West 1993), and the core proceeding pursuant to 28 U.S.C.A. §§ 157(a) (West 1993), 157(b)(1), 157(b)(2)(A), and 157(b)(2)(E).

A trial was held by the Bankruptcy Court on August 27, 1998. In their pre-trial statement, Appellants objected to the Bankruptcy Court's characterization of the proceedings as "core," but consented to the entry of a final order in the matter by the Bankruptcy Court under the provisions of 28 U.S.C.A. § 157(c)(2) (West 1993). The Bankruptcy Court ultimately ruled in favor of Appellee and issued an Order on November 4, 1998 denying Appellants any fees beyond an original retainer of $750, denying reimbursement for costs, and ordering the return of the $3,684 in escrow to Appellee.

In its Opinion, the Bankruptcy Court concluded that Appellants failed to disclose the compensation received from Appellee and the fee arrangement with Appellee, as required by 11 U.S.C.A. § 329(a) and Fed. R. Bankr. P. 2016(b), and that, as a result, the appropriate sanction for Appellant's blatant disregard of this important disclosure requirement was the denial of all compensation sought by Appellant. The Bankruptcy Court further found that Appellants'

misrepresentations violated Pa. R. of Prof. Conduct 3.3 (Candor Toward the Tribunal), and also warranted denial of Appellants' claim for recovery of unpaid legal fees.

Additionally, the Bankruptcy Court concluded that Appellants had violated several other Pennsylvania Rules of Professional Conduct, including: Rules 1.15 and 1.16 – in failing to promptly notify Appellee that the Philadelphia Sheriff's Department had delivered to them $3,684 in funds belonging to Appellee – and Rules 1.5 (charging an excessive fee), 5.3 (failing to properly supervise the activities of a nonlawyer assistant), 5.4 (sharing a fee with a nonlawyer), and 5.5 (aiding a nonlawyer in the unauthorized practice of law) – for allowing Eisenberg, a suspended attorney working as a paralegal, to provide most of the legal services for which compensation was sought without supervision.

Appellants took the instant timely appeal from that final Order of the Bankruptcy Court. They raise three issues on appeal. First, they contend that the Bankruptcy Court's ruling must be reversed because that court lacked subject matter jurisdiction to reopen Appellee's bankruptcy case for the purpose of trying the collection action as an adversary proceeding. Second, they argue that the Bankruptcy Court erred in holding that the collection action at issue was a "core proceeding." Finally, they argue that the Bankruptcy Court abused its discretion by making findings of fact and conclusions of law against the weight of the evidence in the record.

II. DISCUSSION

A. Subject Matter Jurisdiction.

The question of subject matter jurisdiction involves a conclusion of law by the bankruptcy court, and is thereby reviewable de novo by this Court on appeal. See In re A & M Operating Co., Inc., 182 B.R. 997, 1000 (E.D. Tex. 1995).

Appellants point to the fact that Appellee voluntarily dismissed her bankruptcy case in January, 1997 and argue that the effect of that dismissal was to strip the Bankruptcy Court of all future jurisdiction over matters involving Appellee, pursuant to 11 U.S.C.A. § 349 (West 1993). Moreover, while the Bankruptcy Code does allow for the reopening of cases in certain situations, see 11 U.S.C.A. § 350 (West 1993), Appellants argue that the collection action tried by the Bankruptcy Court was not authorized by that section. This Court disagrees.

The Bankruptcy Court below asserted subject matter jurisdiction pursuant to 28 U.S.C.A. § 1334. Section 1334(b) of Title 28 of the United States Code grants original jurisdiction not only of cases in bankruptcy, but also of "all civil proceedings arising under Title 11, or arising in or related to cases under Title 11." 28 U.S.C.A. § 1334(b). The collection action at issue involved a dispute between a former debtor in bankruptcy, Appellee, and her counsel, Appellants, for fees earned prior to and during the bankruptcy. Such a dispute meets the criteria for jurisdiction under § 1334(b).

Appellants attempt to make much of the fact that Appellee voluntarily dismissed her bankruptcy case in January, 1997, and point to that section of the Bankruptcy Code which provides that dismissal operates generally to close bankruptcy proceedings and related matters. See 11 U.S.C.A.§ 349. Indeed, dismissal of a bankruptcy proceeding normally results in dismissal of related proceedings because "federal jurisdiction is premised upon the nexus

between the underlying bankruptcy case and the related proceedings." In re Statistical Tabulating Corp., Inc., 60 F.3d 1286, 1288 (7th Cir. 1995), cert. denied, 516 U.S. 1093 (1996). However, nothing in § 349 requires that result in all cases. As the court in In re Statistical Tabulating Corp. noted, "numerous courts have ruled that jurisdiction is not automatically terminated with the dismissal of the underlying bankruptcy case, and that bankruptcy courts have discretion to retain jurisdiction over adversary proceedings." Id. (citations omitted).

Appellants point to In re Statistical Tabulating Corp. for support of their position. In that case, during the pendency of Statistical Tabulating Corporation's Chapter 11 bankruptcy proceedings, the government appealed an order of the bankruptcy court to the United States District Court. While the appeal was pending, the major creditor of the debtor asked the court to dismiss the bankruptcy proceeding, and the court did so. After the appeal had been ruled upon, the government petitioned to reopen the bankruptcy proceeding, and the bankruptcy court denied the request on the ground that it lacked subject matter jurisdiction. On appeal, the Seventh Circuit reversed, holding that the bankruptcy court retained subject matter jurisdiction because "a live controversy still existed between two creditors when the bankruptcy court dismissed the underlying bankruptcy." Id at 1289. Appellants highlight this language and note that in the instant case there was no such "live controversy" when Appellee dismissed her bankruptcy – Appellants filed their collection action approximately six months after Appellee's voluntary dismissal of her bankruptcy. Therefore, Appellants argue that In re Statistical Tabulating Corp. supports their position that the Bankruptcy Court lacked subject mater jurisdiction to hear the collection action in the instant case.

However, this Court's reading of In re Statistical Tabulating Corp. is different from Appellants'. In explicating the law on when a bankruptcy court may reassert subject matter jurisdiction after a dismissal, the Seventh Circuit in In re Statistical Tabulating Corp. explained that the test was whether or not the disputed issue had "progressed so far that judicial interference is needed to unravel or reserve the rights of the parties." Id. (quoting In re Morris, 950 F.2d 1531, 1535 (11th Cir. 1992)). It was in the context of applying this test that the Seventh Circuit noted the existence of a "live controversy"at the time of the dismissal of the underlying bankruptcy matter in In re Statistical Tabulating Corp. The "live controversy" in that case was only one example of how the rights between a creditor and a debtor can be so intertwined as to warrant judicial interference by a bankruptcy court.

In the instant case the rights of the parties were sufficiently intertwined with the underlying bankruptcy so as to warrant the Bankruptcy Court's reassertion of subject matter jurisdiction, even though there was no "live controversy" at the time of the voluntary dismissal. The Bankruptcy Court below, in a thorough and well reasoned opinion, concluded that Appellants violated several important disclosure rules during their representation of Appellee in the then-pending bankruptcy. That court was uniquely situated to evaluate the significance of these violations in connection with Appellants' demand for fees during that same period. Moreover, this Court notes that in their collection action Appellants claimed legal fees for certain post-petition non-bankruptcy work, totaling $1,302 – Appellants sought fees for legal services unrelated to the bankruptcy but which were allegedly provided during the period when Appellee

was under the protection of the bankruptcy court. Thus, the Bankruptcy Court did not abuse its discretion when it reasserted jurisdiction to decide the collection action.

Having concluded that Appellee's voluntarily dismissal of her bankruptcy did not preclude the Bankruptcy Court from reasserting subject matter jurisdiction pursuant to 11 U.S.C.A. § 349, this Court need not comment further on the jurisdictional issue. Nevertheless, this Court notes that the Bankruptcy Code expressly authorizes bankruptcy courts to reopen closed cases "to administer assets, to accord relief to the debtor, or for other cause." See 11 U.S.C.A. § 350(b). While the collection action at issue in this case does not satisfy the first two criteria for reopening closed cases – the action was not brought to either administer assets or accord relief to Appellee – this Court concludes that the action does meet the standard for "other cause," in light of the nexus between the underlying bankruptcy, the parties' rights and Appellants' violation of the Bankruptcy Code's disclosure rules. See In re Shondel, 950 F.2d 1301, 1304 (7th Cir. 1991) (noting that the trend in reopening cases under § 350(b) has been "to allow the bankruptcy judge broad discretion to weigh the equitable factors in each case").

B. Core Proceeding.

The question of whether a proceeding is a "core proceeding" involves a conclusion of law by the bankruptcy court, and is thereby reviewable de novo by this Court on appeal. See In re A & M Operating Co., 182 B.R. at 1000.

The Bankruptcy Code grants bankruptcy judges the power to hear "all core proceedings arising under title 11 or arising in or related to a case under title 11." 28 U.S.C.A. § 157(b)(1). Section 157(b)(2) of the Bankruptcy Code defines as "core"several types of legal proceedings, including, "matters concerning the administration of [an estate in bankruptcy]", see § 157(b)(2)(A), "orders to turn over property of the estate," see § 157(b)(2)(E), and "other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor . . . relationship," see § 157(b)(2)(O). The Bankruptcy Code also provides that parties may consent to a bankruptcy judge's disposition of a matter, regardless of whether or not it is a "core proceeding." See 28 U.S.C.A. § 157(c)(2).

The determination of whether proceedings are "core" is irrelevant to a determination of whether a bankruptcy court has jurisdiction. See Walnut Assoc. v. Saidel, 164 B.R. 487, 495 (E.D. Pa. 1994) (citing In re Marcus Hook Dev. Park, 943 F.2d 261, 266 (3d Cir. 1991). "Section 157(b) does not provide an independent source of jurisdiction to hear [a] complaint. It merely allocates the jurisdiction created by 28 U.S.C. § 1334 between core and non-core proceedings." Walnut Assoc., 164 B.R. at 495 (quoting In re Cary Metal Products, Inc., 152 B.R. 927 (Bankr. N.D. Ill. 1993).

This Court has already concluded that Appellee's voluntary dismissal of her bankruptcy did not have the effect of precluding the Bankruptcy Court from reasserting subject matter jurisdiction as Appellants' posited; the Bankruptcy Court did not abuse its discretion in asserting jurisdiction over the collection action. Moreover, Appellants consented to the entry of a final order by the Bankruptcy Court in disposition of the collection action pursuant to 28 U.S.C.A. §

157(c)(2). Therefore, the question of whether or not the controversy was a "core proceeding" is of no legal significance in this appeal.

C. Abuse of Discretion in Findings of Fact and Conclusions of Law.

Although Appellants couch their third point of error in terms of erroneous "findings of fact" and "conclusions of law," this Court failed to find in Appellants' briefing on this issue any allegation that the Bankruptcy Court misapplied the law. Rather, Appellants argue that the Bankruptcy Court "ignored testimony of witnesses," "speculated," and "[paid] attention to the rhetoric and fabrications of opposing [counsel]." Thus, Appellants are essentially challenging only the Bankruptcy Court's finding's of fact and, as such, this Court will apply the "clearly erroneous" standard of review to this issue on appeal. See Fed. R. Bankr. P. 8013 (West Supp. 2000); In re Molded Acoustical Products, Inc., 18 F.3d 217 (3d Cir. 1993).

Appellants first claim that the Bankruptcy Court's finding regarding Appellants' failure to disclose during the pending bankruptcy the compensation already paid by Appellee for legal services and the compensation to be paid in the future as a result of the existing fee arrangement with Appellee, as required by Fed. R. Bankr. P. 2016(b), was not supported by the evidence. However, upon review of the proceedings below, this Court disagrees. There is ample evidence in the record, including Appellants own testimony, to support the Bankruptcy Court's finding that Appellant's falsely stated that they had not collected fees from Appellee within the year immediately before filing for bankruptcy, and that they did not have an agreement with Appellee for future compensation. Accordingly, these findings of fact were not clearly erroneous.

Next, Appellants challenge the Bankruptcy Court's finding that McCullough breached the Pennsylvania Rules of Professional Conduct by allowing to practice law without a license. Appellants point to the fact that Eisenberg was never cross-examined at trial and argues that there "is no contradictory evidence to Appellants' assertions that [McCullough] oversaw the work of the paralegal." This Court rejects that argument.

Contrary to Appellants' assertions, there is ample evidence in the record to support the Bankruptcy Court's finding that Eisenberg engaged in the unlicensed practice of law while employed at McCullough's law office in connection with Appellants' representation of Appellee. For example, Appellee and her daughter both testified as to the nature of their multiple interactions with Appellants' law firm during the seven months or so that Appellee was represented by Appellants. This testimony describes numerous meetings with counsel and various legal activities that were handled by Eisenberg alone without supervision by McCullough. Moreover, although he was not licensed to practice law at any time during the representation of Appellee by Appellants, Eisenberg's services were billed out to Appellee at an hourly rate of $175, the equivalent of McCullough's billable rate as an attorney. In light of these facts, the Bankruptcy Court's findings concerning Eisenberg's unlawful practice of law were not clearly erroneous.

III. CONCLUSION

For all the foregoing reasons, this Court affirms the Bankruptcy Court's Order dated November 4, 1999 which denied Appellants any fees beyond an original retainer of $750, denied

Appellants reimbursement for costs, and ordered Appellants to return to Appellee all monies held in an escrow account on behalf of Appellee.

BY THE COURT:

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JAN E. DUBOIS, J.